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**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

## Decision

**Matter of:** Wilson 5 Service Company, Inc.--Costs

**File:** B-409402.2

**Date:** June 9, 2014

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James S. DelSordo, Esq., Argus Legal, LLC, for the protester.  
Eric N. Weber, Esq., General Services Administration, for the agency.  
Robert T. Wu, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO,  
participated in the preparation of the decision.

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### DIGEST

Protester is not entitled to costs of filing and pursuing protest, where protest was not clearly meritorious even though agency took corrective action.

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### DECISION

Wilson 5 Service Co., Inc., of Kittery, Maine, requests that our Office recommend that the General Services Administration (GSA) reimburse attorneys' fees and costs that the firm incurred in filing and pursuing a protest of the rejection of its proposal as late under request for proposals (RFP) No. GS-01P-13-BW-D-0022, for building operations and maintenance services at government facilities in the State of Maine.

We deny the request.

### BACKGROUND

On June 3, 2013, the agency issued the RFP as a total small business set-aside for building operations and maintenance services. Offerors were instructed to submit one original proposal and five copies, along with an electronic copy of the proposal on compact disk, to a specified physical address, with attention to the contract specialist. RFP at 262. The RFP did not authorize electronic submission of proposals at the time of initial proposal submission.

Wilson 5 submitted a timely proposal which was included in the competitive range. The agency conducted discussions with the firm, and subsequently invited Wilson 5 to submit final proposal revisions. In the agency's October 31 letter to Wilson 5, the

GSA instructed that revised proposals were to be submitted by 2:00 p.m. on November 5, via email to the specified email address of the contract specialist.

On November 5, at 1:43 p.m., the contract specialist received an email from Wilson 5 transmitting the firm's Final Proposal Revision Volume I, Price and Business Proposal. The email received by the agency included a file attachment named "FPR PRICE & BUSINESS PROPOSAL.zip." Agency Report (AR), Exh. 7, GSA.gov Mail, Nov. 5, 2013. The email also informed the agency that Wilson 5's technical proposal would be sent separately due to file size, and an original hard copy of both the technical and price proposals were being sent via Federal Express Next Day Air.<sup>1</sup> Id. The promised email transmitting Wilson 5's technical proposal never arrived in the contract specialist's email box, and, consequently, the firm was informed that its proposal was excluded from the competitive range and was no longer being considered for award. AR, Exh. 6, Exclusion Notice, Dec. 19, 2013.

On December 20, the contracting officer spoke with Wilson 5's vice president about the matter. Contracting Officer's Statement at 3. Wilson 5's vice president claimed that the revised technical proposal was received by several of the firm's staff, who were included on the email. Id. The contracting officer told Wilson 5 that the revised technical proposal was not received by the contract specialist, as required by the solicitation, and offered to contact the agency's information technology (IT) staff to look into the issue. Id.

The contracting officer asked GSA's Regional IT Manager to investigate the disposition of the email. Id. at 4-5; AR, Exh. 20, Affidavit of GSA Regional IT Manager. He began his investigation by asking Wilson 5 to resend the email from the firm's "sent" box to his GSA.gov email address. When the email was not received, he asked that the email be sent to his GSA.gov email address again, as well as to his personal email address. AR, Exh. 20, Affidavit of Regional IT Manager at 1. He received the email at his personal email address, but not at his GSA.gov email address. The email received at his personal email address indicated that it had also been sent to a GSA.gov email address, but the Regional IT Manager again determined that it had not been received. Ultimately, the Regional IT Manager learned that the email had been blocked from entering the government network by the Google Postini server and quarantined.<sup>2</sup> Id. He overrode the block

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<sup>1</sup> The record shows that the proposal sent via Federal Express was received by the agency at 10:57 a.m. on November 6. AR, Exh. 6, Exclusion Notice, Dec. 19, 2013.

<sup>2</sup> GSA has contracted with Google to provide email services to the agency. Id. In Google's email structure, the Google Postini server serves as a security filter whose purpose is to protect the integrity and electronic infrastructure of GSA's network. Id. at 2. The Google Postini Message Center is a location within the Google Postini server where unsafe emails, such as those that contain virus, malware, or other security threats, or emails that for some reason cannot be scanned to ensure they

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and had the email delivered to his GSA email box. The email contained a compressed file attachment with a “.rar” extension, and his attempts to open the attachment resulted in an error message.<sup>3</sup> He concluded that, since the resent message was quarantined, likely related to the attachment error, this was the likely outcome of the email when originally sent on November 5. Id.

In its protest, Wilson 5 argued that the agency unreasonably rejected its proposal as late. The firm asserted that its proposal revisions were actually received by the government before the deadline for submission, but were prevented from reaching the designated email address because of a technology error on the part of the government. The protester asserted that the situation here was the same situation confronted by the U.S. Court of Federal Claims in Insight Systems Corp. v. United States, 110 Fed. Cl. 564 (2013), and urged this Office to adopt the rationale of Insight in sustaining its protest. In its agency report, GSA argued that it never received Wilson 5’s proposal revision prior to the deadline for final proposals, and properly determined that it was submitted late. GSA further argued that the facts in this case were distinguishable from those in Insight.

After Wilson 5 filed its comments on the agency report, our Office asked the parties to respond to a number of questions soliciting factual information. The responses submitted by the parties raised additional questions that were explored in a March 20 conference call. At the conclusion of the conference call, our Office asked the parties to provide additional legal briefing on two issues, as well as additional factual information. Before our Office obtained this supplemental information from the parties, GSA announced that it was taking corrective action by considering the protester’s revised technical proposal. On March 24, our Office dismissed Wilson 5’s protest, finding that the agency’s proposed corrective action rendered it academic. Wilson 5 Service Co., Inc., B-409402, Mar. 24, 2014. On April 7, Wilson 5 filed a request asking our Office to recommend that GSA reimburse its costs of filing and pursuing its protest.

## DISCUSSION

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are free from security threats, are quarantined. Emails placed in quarantine are permanently deleted within 14 days. Id.

<sup>3</sup> According to GSA, a .rar file is a file archive containing one or more files compressed with RAR compression, which incorporates a proprietary compression algorithm to compress a file, thereby reducing its size. Supplemental Affidavit of GSA Regional IT Manager at 1. GSA uses WINZIP as its approved compression utility, but the version used by GSA does not have the capability of accessing a .rar file. Id. The GSA Regional IT Manager characterizes the .rar extension as an “uncommon” file format. AR, Exh. 20, Affidavit of GSA Regional IT Manager, at 2.

Wilson 5 contends that reimbursement of its costs is appropriate because, in its view, the agency unduly delayed taking corrective action by waiting until after the protester filed its comments on the agency report, as well as its supplemental comments in response to our Office's questions, and until after a conference call and an additional request from our Office for further briefings. Wilson 5 does not advance any argument at all as to why it believes its protest was clearly meritorious.

Where a procuring agency takes corrective action in response to a protest, we may recommend that the agency reimburse the protester its protest costs where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing a protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. 4 C.F.R. § 21.8(e) (2014); Information Ventures, Inc.--Costs, B-294580.2 et al., Dec. 6, 2004, 2004 CPD ¶ 244 at 2-3; Georgia Power Co.; Savannah Elec. and Power Co.--Costs, B-289211.5, B-289211.6, May 2, 2002, 2002 CPD ¶ 81 at 5. Thus, as a prerequisite to our recommending that costs be reimbursed where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious. Apptis Inc.--Costs, B-402146.3, Mar. 31, 2010, 2010 CPD ¶ 123 at 4; Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3. We consider a protest to be clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position; i.e., where the protest does not involve a close question. Triple Canopy, Inc.--Costs, supra; Georgia Power Co.; Savannah Elec. and Power Co.--Costs, supra.

We find that reimbursement is not appropriate in this case since, even if we agreed with Wilson 5 that the agency's corrective action was not prompt, the protest was not clearly meritorious. As explained above, reaching a decision on the protest required further development, which is why our Office requested supplemental information from the parties. Following this further development of the record, we would have had to conduct substantial further analysis of the parties' positions. Because the ultimate resolution of the protest required further development, in our view, the protest presented a close question, and therefore was not clearly meritorious. Systems Research and Applications Corporation--Costs, B-406775.3, Apr. 10, 2013, 2013 CPD ¶ 99 at 5; Yardney Technical Products, Inc.--Costs, B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4. Accordingly, we decline to recommend reimbursement of Wilson 5's protest costs.

The request is denied.

Susan A. Poling  
General Counsel